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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

SOUTHERN NATURAL GAS COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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I. The United States' Brief in Opposition, contrary to its stated purpose, demonstrates convincingly why this Court should grant certiorari and examine the Eleventh Circuit's failure to apply proper standards of appellate review in this case.

The Brief filed by the United States in Opposition to the Petition for Certiorari demonstrates the confused state of the record and thereby validates, rather than refutes, the compelling reasons justifying the Court's review of this case. The United States, in the first six pages of its Brief, recites undisputed facts. For each fact referenced, the United States provides parallel citations to the Eleventh Circuit's Opinion and to the district court's Findings of Fact. *See* Brief of the United States in Opposition at 2-6 (hereinafter "Brief"). On page seven, the Brief begins to focus on a few of the critical facts seized upon by the Eleventh Circuit Panel in reversing the findings of the district court. Incredibly, every disputed fact called to this Court's attention in the Brief is referenced by citing only to the Eleventh Circuit Panel Opinion — an Opinion that is devoid of citations to the trial record on these important issues. Through the use of this creative writing, the United States is able to create a "record" to justify the Panel Opinion. Two examples are worthy of note.

On page seven of its Brief, the United States provides the Court with a block quotation from the Panel's discussion of the purpose of the Corps of Engineers' locks and dams. Leading into the quoted passage the United States claims: "The *record* also made plain that. . . ." Brief at 7 (emphasis added). For this "plain finding" from the "record," the United States cites to "A10" — the Panel Opinion. A review of the cited passage in the Opinion shows that the Panel neither referenced the trial record nor understood the evidence in its discussion of the purpose of the locks.

The Panel wrote that the lock and dam facilities: "[A]re not designed to accommodate flood waters. . . ." The Eleventh Circuit's conclusions about the purposes of the locks and dams is questionable at best. Hours of testimony were devoted to the capacities and capabilities of the lock and dam spillway gates (or

flood gates) to handle or accommodate flood waters. Extensive Corps of Engineers' documents on the proper operation of the spillway gates during floods formed a central focus of the district court's findings.

The district court's findings address the design of the spillway gates, Corps' regulations governing their operation and the Corps' actions in operating the spillway gates. *See* Findings of Fact at A-15 to A-20 and A-26 to A-38. For the Eleventh Circuit to conclude that the flood gates were not "designed to accommodate flood waters" was patently wrong. The United States' Brief, quoting and building upon this unfounded Panel conclusion, proclaims: "The district court, however, had improperly ignored these critical facts." Brief at 7. What facts did the district court ignore? How could the district court consider facts the Eleventh Circuit found? The argument advanced in the Brief is disingenuous. The United States criticizes one of its judges for "improperly ignor[ing] these critical facts" when no such facts existed. The undisputed evidence was that the spillway gates were specifically designed and operated to handle or accommodate flood waters. The topsy-turvy argument advanced in the Brief — based on incorrect or nonexistent facts improperly found by an appellate panel — is only possible when Rule 52(a) is ignored.

The Brief of the United States makes a second argument on a "record" that does not exist. The Brief declares: "*The record further showed that,* during the 'critical period [on December 2 and 3], as more water moved down the river as a result of the unprecedented rain, more water was released over the dam, *i.e., the flow out of the dam was matching the flow into the lake above the dam.*' " Brief at 7 (emphasis added). For this finding from the "record" the United States again guides the Court to page 10 of the Petition Appendix — the Panel Opinion.

A cursory review of the referenced Opinion passage discloses that the Panel cited *no* part of the record to support its conclusion. The Panel may have had a "definite and firm conviction" that water was being properly passed through the spillway gates by the Corps of Engineers as the river level rose, but the Corps' own documentary evidence at trial established that the opposite was true. "The Corps' own records show that

Holt [lock and dam] *was not* operated as a run-of-the-river dam is supposed to be operated during this critical time." Finding of Fact No. 43, A-35 (emphasis added). The great weight of the evidence in the trial record – as opposed to the Panel Opinion "record" – discloses that the Corps of Engineers improperly operated the spillway gates and did not release the rising levels of water moving down the river.[1] The Panel never held that these findings by the district court were in error. For the United States to suggest in its Brief that the Panel's unsupported "findings" that the spillway gates were properly operated is somehow a "record" demonstrates beyond peradventure the mischief engendered by appellate fact finding.

The Brief of the United States suggests to this Court: "Further review of Petitioners' fact-specific claims is unwarranted." Brief at 8. This Petition does not ask the Court to grant certiorari so that there will be a third judicial interpretation of the intricate facts in this case. Rather, this Petition seeks an examination of the Eleventh Circuit's erroneous application of Rule 52(a) and this Court's decisions prohibiting this type of *de novo* trial on appeal.

The Brief of the United States begs the question presented. Rather than justifying or demonstrating to this Court the manner in which the Eleventh Circuit properly applied Rule 52(a) and the prior teachings of the Court, the Brief merely attempts to rationalize the decision using the Panel's evaluation of the evidence. The Brief does not offer one relevant, legitimate or factually supported example of the district court's finding of false or incorrect facts.[2]

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1. The district court also found: "First, the gate opening record at Holt proves that the [Corps'] operator violated the undisputed Corps requirement that the [spillway] gates must be opened as soon as the upper pool exceeds the elevation of 187 msl and are to be raised continuously until the upper pool recedes below 187 msl." Findings of Fact No. 43, A-35. *See also* Petition of Parker Towing Company, Inc., No. 89-123, at 23-25 and Parker Towing Appendices "D" and "E," which graphically describe and demonstrate the Corps' improper operation of the spillway gates.

2. At footnote 4, the United States does suggest that the Eleventh Circuit noted an "inaccuracy" in the district court's findings. The district court

The Brief highlights, on three occasions, the troubling language used by the Eleventh Circuit to justify the substitution of its judgment for that of the district court. Citing *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), the Brief correctly informs the Court that the Panel claims it was "left with a definite and firm conviction" that the district court had wrongly evaluated the evidence at trial. Brief at 6, 7 and 9. This "definite and firm conviction," according to the United States, is a "narrow standard of review." *Id.* at 6. Petitioner contends otherwise. A rule allowing circuit courts to reverse verdicts on "firm conviction" is no standard at all. The United States does not argue that this standard of review is appropriate, it only suggests that the Panel applied "well-settled law governing the review of lower court findings under the 'clearly erroneous' standard of review." Brief at 8.

The United States contends this case "[d]oes not present an occasion for the Court to revisit the issue of appellate review of trial court findings." Brief at 9, n.9. It is difficult to imagine a more appropriate case. The Court does not need to review the trial record to observe the improper appellate review undertaken by the Eleventh Circuit. One reading of the district court's insightful and detailed Findings of Fact, A-13 to A-45, imparts a distinct and easily understood impression of the events on the Black Warrior River at issue in this case. Thereafter, a careful reading of the Panel Opinion, which finds no error in the district court's detailed fact finding, leads to the inescapable

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NOTES *(Continued)*

found that all parties, save the United States, had settled claims with Warrior & Gulf. A-44. This indeed was a mistaken finding by the district court noted by the Panel. The reality, however, is that this finding had no impact on the district court's findings of proximate cause. This finding does serve an important point because it is an example of "clear error." Whether some of the parties had settled with Warrior & Gulf was a matter capable of objective and irrefutable proof; the error was patently demonstrable. This must be the type and substance of "clear error" of which Rule 52(a) speaks. This singular identified error of the district court, however, was on a minor and nonessential point.

conclusion that the Eleventh Circuit did no more than improperly substitute its judgment for that of the district court.[3]

The "definite and firm conviction" test utilized by the Eleventh Circuit and justified by the United States in its Brief is tantamount to no standard of review. This type of appellate review renders the trial record and determinations of the district court meaningless. To review a "record" such as the one the Eleventh Circuit created leaves this Court only to ponder the imponderable — what did the appellate court think, how did its thought processes lead to a "firm conviction" of error below? It is nearly impossible for this Court to review the Panel Opinion and determine, factually, how it reached that Opinion.

II. The Brief of the United States raises questions about fine print in a forty-year-old Corps of Engineers' permit to obscure the importance of this case.

The United States raised, at the opening of trial, an affirmative defense based on clause "g" in a 1949 Corps of Engineers' Permit issued to Petitioner Southern Natural Gas Company for construction of one of the two submarine pipelines destroyed in the accidents giving rise to this lawsuit. The Corps of Engineers' contention was that the language in clause "g" exculpated it from liability for destroying the pipelines. This contention, for some curious reason, is repeated at length in footnote number 5 and mentioned in footnote 7 of the United States Brief.[4]

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3. Perhaps the Corps of Engineers does not want to revisit the issue of appellate review as its recent experiences indicate that hard cases may be easier to win on the merits in the courts of appeals. Just this past term, the Court held over Petition No. 88-1904, *In re Ohio River Disaster Litigation; Walker Towing Corporation v. United States of America* (Filed May 24, 1989). In the *Ohio River Disaster Litigation,* the Sixth Circuit reversed a verdict against the Corps of Engineers. In the present case, in the Eleventh Circuit, the United States cited approvingly to the Sixth Circuit's reversal of the district court in the *Ohio River Disaster Litigation.*

4. Petitioner is at a loss to understand why the United States raises clause "g" in its Brief opposing the Petition. One possible reason for asserting this non-issue in the Brief is to signal to the Court that the Corps believes it should

Over the objections of Southern Natural Gas Company that the defense had been waived, the district court received and considered evidence on the Corps' permits and clause "g." The evidence at trial established that clause "g" was not contained in the 1929 Corps' permit authorizing construction of Southern Natural Gas Company's pipeline number 1, which was also destroyed in this accident. *See* Findings of Fact No. 23 and 24, A-24. The Corps conceded at trial and on appeal that clause "g" applied, if at all, to only one of the two destroyed pipelines. Footnote 5 of the United States' Brief, however, mistakenly asserts that permit clause "g" applied to both of the Southern Natural Gas Company pipelines. The questions about clause "g" have absolutely no bearing on the issues in the Petition for Certiorari.

CONCLUSION

The Brief in Opposition filed by the United States demonstrates, albeit unintentionally, the significant issues presented in this Petition. The Brief of the United States guides this Court to a "record" that consists of little more than the Eleventh Circuit's undocumented and improper evaluations of evidence. The ability to interpret a trial record manifestly demonstrates the necessity of the Court's examination of what happened on appeal in this case. Something went awry. The "definite and firm conviction" of the Eleventh Circuit was no more than a euphemism for proscribed appellate second-guessing. This Court's prior holdings and lack of guidance on proper procedures for appellate review of evidence, have been incorrectly interpreted to condone this type of judicial activism. By granting certiorari and reconciling ambiguous precedent, the Court can avert this type of uncalled for appellate factual review, conserve judicial

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NOTES *(Continued)*

have prevailed at trial or on appeal on alternate grounds, *i.e.*, deny certiorari because the Petitioner should have lost anyway. If this is the reason for the reference to clause "g," the argument is improper because the Brief should only disclose "any matter or ground why the cause should not be reviewed by this Court." Sup. Ct. R. 22.1. The Court has not been asked to review the clause "g" issue.

resources, reinvigorate the significance of Rule 52(a)'s narrow review and affirm the deference that should be given to district court judgments. A denial of certiorari may induce the opposite results.

Respectfully submitted,

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